Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Comprehensive Review of the	)	WC Docket No. 14-130
Part 32 Uniform System of Accounts	)	
	)	
Jurisdictional Separations and Referral to	)	CC Docket No. 80-286
the Federal –State Joint Board	)	

REPLY OF NCTA – THE INTERNET & TELEVISION ASSOCIATION TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

NCTA – The Internet & Television Association (NCTA) submits this Reply to the Oppositions filed by the United States Telecom Association (USTelecom) and AT&T Services, Inc. (AT&T)[1] to NCTA's Petition for Reconsideration filed in the captioned proceeding.[2]

I. WITHOUT CHANGES, THE PART 32 ORDER DOES NOT PREVENT UNJUST POLE ATTACHMENT RATE INCREASES AND COST-SHIFTING

Neither USTelecom nor AT&T dispute the significant role that pole attachments play in the deployment and availability of voice, video and data networks,[3] or the centrality of the Commission's role in protecting against what the Supreme Court, Congress and the Commission have recognized as "monopoly rents."[4] Indeed, in the *Wireline Infrastructure* docket, AT&T is

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1 Opposition of the USTelecom Association, WC Docket No. 14-130 (July 21, 2017) (USTelecom Opposition); Opposition of AT&T, WC Docket No. 14-130 (July 21, 2017) (AT&T Opposition).

2 Petition for Reconsideration of NCTA, WC Docket No. 14-130, CC Docket No. 80-286 (June 5, 2017) (Petition).

3 *Comprehensive Review of the Part 32 Uniform System of Accounts*, WC Docket No. 14-130, CC Docket No. 80-286, Report and Order, 32 FCC Rcd 1735, 1746, ¶ 35 (2017) (*Part 32 Order*); Petition at 2.

4 *National Cable & Telecomms. Ass'n v. Gulf Power Co*., 534 U.S. 327 (2002). *See also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5242 ¶ 4 (Apr. 7, 2011) (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), reprinted in 1978 U.S.C.C.A.N. 10) ("When Congress granted the Commission authority to regulate pole attachments, it recognized the unique economic characteristics that shape relationships between pole owners and attachers. … Congress recognized further that there is a 'local monopoly in ownership or control of poles,' observing that, as found by a Commission staff report, '"public utilities by virtue of their size and exclusive control over access to pole lines, are

encouraging the Commission to reduce the pole rents that it pays to power companies "by more than half."[5] As explained below, these principles compel the Commission to grant NCTA's petition.

A. The Oppositions Make Clear that Pole Rates Will Increase Solely Due to Shifting from Part 32 to GAAP

In pursuing relief from Part 32 rules, the incumbent local exchange carriers (LECs) assured the Commission that shifting accounting methods from Part 32 to GAAP is "not an effort to increase pole attachment rates" and "not an attempt to do some other rate- or cost-shifting."[6] The Commission took them at their word, accepting the assurance that a change in accounting "does not change *what* costs may be included in pole attachment rates," that "rates will remain steady over the long-run," and that the change could thereby be consistent with the Commission's goals for deployment.[7]

Having convinced the Commission to change its rules, USTelecom now suggests that neither it nor its members ever said that rates would not increase,[8] and it has already started to walk back the assurances the carriers offered to gain Part 32 relief. Consider, for example, what USTelecom says about the original pole cost rate base on which pole rents are supposed to be based. The Commission always has required pole attachment rents to be based on the original

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unquestionably in a position to extract monopoly rents … in the form of unreasonably high pole attachment rates."""").

5 Comments of AT&T Services, Inc., WC Docket No. 17-84 (June 15, 2017) at 23 (AT&T Infrastructure Comments).

6 *Part 32 Order*, 32 FCC Rcd at 1747, ¶ 38 (citing Letter from B. Lynn Follansbee, Vice President-Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-130, at 2 (Feb. 14, 2017)) ("Price cap carriers have explained that shifting accounting methods is 'not an effort to increase pole attachment rates' and 'not an attempt to do some other rate- or cost-shifting.'").

7 *Part 32 Order*, 32 FCC Rcd at 1747, ¶ 38.

8 *See* USTelecom Opposition at 6 (describing as "inaccurate" NCTA statement regarding carrier contentions that the use of GAAP cost data would not alter pole attachment charges).

booked cost of a bare pole when dedicated to public service, regardless of subsequent corporate acquisitions and reorganizations (i.e., the rate base).[9] Neither USTelecom nor AT&T contest that many carriers have already recovered more than 100% of their pole costs.[10]

But USTelecom now says that carriers should no longer be required to follow the original cost principle after a merger,[11] which would allow a carrier to increase pole costs through corporate transactions, such as, for example, the pending CenturyLink/Level 3 merger. Under USTelecom's proposal to repudiate original cost, shifting to GAAP rates would double charge cable operators for these same, previously recovered costs, and even earn a positive rate of return on a pole rate base that has long been recovered. USTelecom now admits that stepping up pole costs this way is "the purpose of Part 32 relief."[12] Left unchecked, any corporate transaction – even an internal reorganization – may well be followed by pole rent increases that are solely attributable to accounting changes and wholly unrelated to any increase in pole costs or investment.

Moreover, changing the pole cost rate base is just part of the problem. Neither USTelecom nor AT&T refute many of NCTA's other examples of how pole rents can be inflated using GAAP, including: how the carriers' GAAP accounting commingles lower pole maintenance expenses with more costly maintenance of aerial lines and underground and buried

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9 *See* 47 C.F.R. §§ 1.1404(g)(2), 1.1404(h)(2) (pole data to be based on based on original historical cost); 47 C.F.R. § 32.2411 ("This account shall include the original cost of poles, crossarms, guys and other material used in the construction of pole lines and shall include the cost of towers when not associated with buildings."); 47 C.F.R. § 32.2000(e) (continuing property records to be maintained on the basis of original cost); Petition at 14-15. Substantive pole attachment law has rejected numerous attempts to raise pole costs to a "market" or "forward-looking" valuation. Petition at 4.

10 As Exhibit 6 to the Petition illustrates from public data, AT&T's pole investment in SWBT poles in each of the past 5 years has been stagnant, but accumulated depreciation keeps growing and is now more than 200 percent of the original cost of its poles.

11 USTelecom Opposition at 2.

12 *Id*. ("[A]sking the FCC to require price-cap carriers to continue to follow Part 32 for certain things like valuation of assets after a merger defeats the purpose of Part 32 relief.").

cable; how it restates plant depreciation in ways that do not account for pole costs previously recovered in advance from cable operators through pole rent; and how it reverses the trajectory of rates that have been declining to reflect recovered costs and allows GAAP rents to increase and overtake rents based on Part 32.[13] While the incumbent LECs make vague suggestions that some of these matters will be handled in "the same or very similar ways" as they are today,[14] such assurances are meaningless because they are not explicit requirements imposed under the rules adopted in the *Part 32 Order*.

B. The Implementation Rate Differential Will Not Prevent Unwarranted Pole Attachment Rate Increases

USTelecom and AT&T seem to recognize that rates may increase under a GAAP-based regime, but they assert that any concerns are fully addressed by the new rule requiring application of an Implementation Rate Differential (IRD) to GAAP-based rates for 12 years. The IRD is supposed to true up GAAP rates with Part 32 rates by subtracting the difference until the IRD sunsets. But NCTA has demonstrated that the IRD is an insufficient safeguard.[15] The IRD calculates a fixed delta between a GAAP rate derived in the first year that a carrier transitions from Part 32 to GAAP, and then applies that delta to all subsequent years. But it is not clear whether the rules prevent a carrier from stepping up the pole rate base in Year 2 or later and raising rates immediately thereafter. Nor does the rule explicitly require a carrier to unbundle its maintenance expenses or derive its other carrying charges using the same allocations that were used in Year 1.[16]

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13 Petition at 15-18.

14 USTelecom Opposition at 5.

15 Petition at 17-18.

16 And even without those manipulations, NCTA has demonstrated how even a 3% annual increase in GAAP rents would reverse the trajectory of rates that have been declining to reflect already-recovered costs and allow GAAP rents to increase and overtake rents based on Part 32. Petition at Ex. 7.

Neither USTelecom nor AT&T contest any of this. Indeed, USTelecom essentially admits that no carrier submitted a pole rent calculation into the record.[17] And with no information on projected pole rates in the record, the Commission could not – and did not – sufficiently analyze the effect that changing its rules would have. The Commission instead relied solely on the carriers' eleventh-hour IRD proposal as the basis for concluding that there would be no significant pole rate changes under the new rules. But the record shows that even with the IRD rule, the *Part 32 Order* will lead to increases in pole attachment rates solely due to the transition from one accounting regime to another, notwithstanding Commission statements suggesting otherwise.

To protect against monopoly pole rents and promote deployment of facilities, the Commission should adopt the changes recommended by NCTA in its petition for reconsideration. Specifically, the Commission should: (1) provide direction to ensure that the new regulatory regime "does not change what costs may be included in pole attachment rates" and that "rates will remain steady over the long-run" as intended; (2) prohibit carriers from inflating pole costs under GAAP above their traditional "original cost" (and thus not permit them to "step up" pole valuation after acquisitions or otherwise); (3) prohibit carriers from charging again for costs of disposal that have already been recovered through depreciation charges; (4) require carriers to track and report the pole maintenance expenses, as USTelecom suggests they will, rather than the aggregate maintenance expenses; and (5) require that those carriers that have already depreciated their pole costs to less than zero under Part 32 may no longer charge for capital investment, but only for pole expenses.

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[17] USTelecom Opposition at 6 (responding to NCTA statement that carriers had not performed pole rate calculations or compared rate formula results with the non-sequitur that "[r]egardless of what is in the record, the Implementation Rate Difference adopted by the Commission is clearly meant to insulate all attachers from differences between GAAP-based and USOA-based rates").

II. THE COMMISSION MUST CONTINUE PROVIDING PUBLIC ACCESS TO DISAGGREGATED POLE COST DATA AND ANY UNDERLYING ALLOCATIONS AND CALCULATIONS

As NCTA explained in its Petition and as long recognized by the Commission, the availability of pole data is essential to a well-functioning set of pole attachment rules and, more broadly, the continued rapid deployment of broadband.[18] Specifically, NCTA urged the Commission to continue providing access to pole cost data through public postings and pre-complaint discovery, and to require that carriers responding to such discovery must (1) provide disaggregated pole cost data and include any underlying allocations and calculations for the cost data and pole attachment rate calculation; and (2) not require confidential treatment.[19]

On this issue, the position of the incumbent LECs is closer to NCTA. USTelecom asserts that preserving these rules is unnecessary because carriers still must submit Report 43-01 Table III as a condition of the ARMIS waiver.[20] AT&T stated in the *Wireline Infrastructure* docket that it "supports the public availability of pole attachment rate information" including all of "the underlying data they use to calculate rates"[21] and in this proceeding it makes the point that attachers still have the same right to pre-complaint discovery that they did before the *Part 32 Order*.[22] Based on this record, the Commission should state unequivocally that all pole owners, including those that transition to GAAP accounting, must make available, without the need for a

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18 Petition at 10-11, 6 ("This party-to-party regime has resulted in just and reasonable rates, encouraged broadband deployment, and helped minimize burdens on the Commission.").

19 Petition at 8-11.

20 USTelecom Opposition at 3, n.15 (stating that "the requirement to file the pole attachment cost report for FCC regulated states is already a condition of forbearance from the ARMIS reporting requirements and nothing in the *Part 32 Order* eliminates this requirement" and citing 2008 ARMIS reporting forbearance order).

21 AT&T Infrastructure Comments at 24.

22 AT&T Opposition at 2 ("This process [in which the Commission will review pole attachment rates at the request of an attacher] is in addition to the disclosure requirements associated with the Commission's pole attachment complaint procedures in 47 C.F.R. § 1.1404.").

protective order, all pole cost data, including any underlying allocations and calculations for the cost data and pole attachment rate calculation.

The wisdom of such transparency, and the need for a clear affirmation of these requirements by the Commission, is demonstrated by the pleadings in this docket. AT&T faults NCTA for analyzing expense data as reported by AT&T under Protective Order on October 7, 2016, rather than the data AT&T submits with its Opposition which it says contains some confidential but unexplained "actuarial adjustments."[23] It then claims that any calculation using that October 7 data yields "a meaningless, apples to oranges comparison."[24] Yet until its Opposition, AT&T provided NCTA *only* its October 7 data under the Protective Order, *not* the GAAP data with its (claimed) actuarial adjustments that AT&T now faults NCTA for not having.[25] This episode illustrates the problems that will exist if data is not routinely provided outside of a protective order and how *any* challenge can be answered with an unexplained midnight "actuarial adjustment" unless the Commission imposes more explicit obligations on the incumbent LECs.

To avoid this result, the Commission should adopt the process and accounting instructions requested by NCTA. The Commission should ensure continued routine access to all pole attachment rate information outside of a protective order, including any underlying allocations and calculations for the cost data and pole attachment rate calculation. The Commission should also make clear that attaching parties have continued access – through existing pre-complaint discovery and public postings – to the information necessary to derive

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[23] AT&T Opposition at 2-3.

[24] *Id*.

[25] Neither AT&T nor USTelecom contested any of NCTA's other accounting demonstrations and comparisons submitted with the Petition.

pole attachment rates using the Commission formula and that carriers that currently submit Report 43-01 Table III should be compelled to continue doing so, without the use of a protective order, for all states in which they have pole plant.[26]

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Commission reconsider, revise and clarify its *Part 32 Order* as set forth above and in NCTA's Petition for Reconsideration.

Respectfully submitted,

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[26] *See* Petition at 10. Requiring the automatic posting of pole attachment rate data by carriers, as carriers for whom the Commission has forborne from full Part 32 filings have been required to do, will solve three problems with the *Part 32 Order*. First, it will reduce the transactional costs for obtaining pole rent information, and help avoid deployment delays. Second, it will cure a problem in the transparency provisions of the *Part 32 Order*, which could be read to permit a carrier to opt into GAAP in year four, but only provide access to rate information for years 1-3 after the rule is adopted. Third, it will respect the needs of attachers and state commissions in certified states that have come to rely on the availability of this data. *See* Petition at 10.

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that on this 31st day of July, 2017, I served one copy of the foregoing Reply of NCTA to Oppositions to Petition for Reconsideration on the following parties:

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